FILED
MAR 15
WM. R. ST

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1925.

No. 257

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

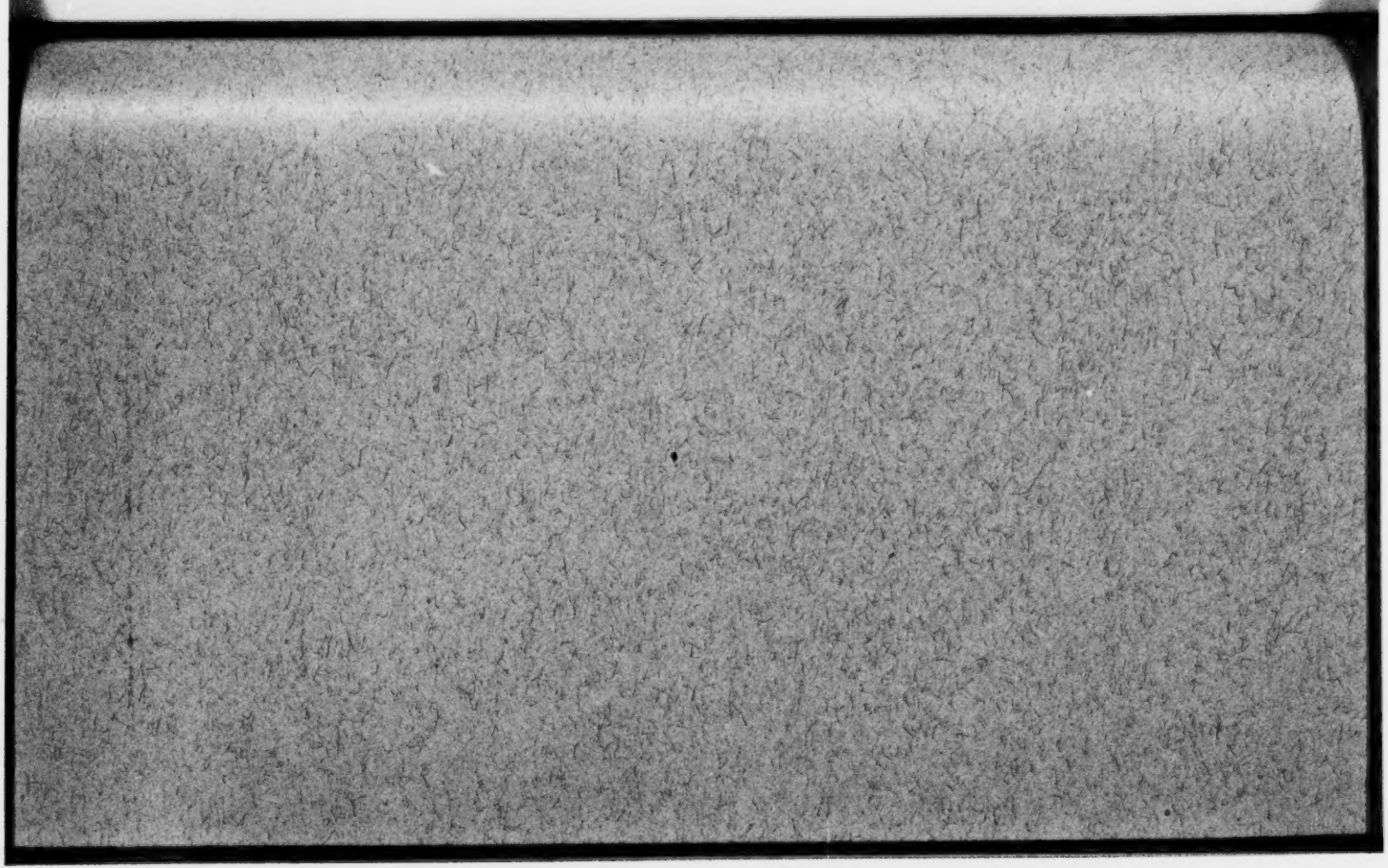
ALVIN R. DURHAM COMPANY, and FRED S. LARSON, Alias FRED M. LARSON,

Respondents.

BRIEF FOR RESPONDENT ALVIN R. DURHAM COMPANY

JULIUS J. PATEK,
Counsel for Respondent, Alvin R. Durham Company.

JOSEPH L. HOOPER,
MYRON H. WALKER,
SOLOMON W. PATEK,
Of Counsel.



SUMMARY

Page

I. Statement of Case ---------- 1-2

II. Statement of Facts ---------- 3-7

III. Argument:

A. Correction of Petitioner's Statement and conclusions relative to the custody and possession of the apples remaining in the car at the time of the service of the writ of garnishment, and a correct version thereof disclosing custody and possession thereof in the garnishee defendant at such time ---------- 7-9

B. The Bill of Lading governs the rights of the parties, and the construction placed upon Section 5 of the "Conditions" (Pl. Ex. 2, Trans. 8, fol. 16) by the decision of this Court in the case of Michigan Central Railway Company v. Mark Owen & Co. 41 Sup. Ct. Rep. 554; 256 U. S. 427, establishes conclusively that at the time of the service of the writ, the apples not then removed from the car were in the custody and possession of the garnishee defendant, petitioner herein. There was no "delivery" of the apples still in the car---------- 9-16

And, the Michigan Supreme Court concurred in such construction, and properly held that at the time of the service of the writ of garnishment, the apples still remaining in the car at the time of the service of the writ, were in the possession of petitioner as well in its custody, thereby rendering it liable to plaintiff in this case ----------16-17

Cases decided by this Court and abstracts therefrom which respondent claims support such determination ----------17-19, 23

Page

Uniform Bill of Lading Act, August 29, 1916, Sec. 23; 39 Statutes at Large, 542, recognizes that surrender of bill of lading is not a delivery of the goods or of possession, so as to preclude garnishment of the carrier for the goods ----------19-20

The garnishee defendant, petitioner herein, must necessarily have had custody and possession of the car and contents since it had the right and it was its duty to collect demurrage charges after the 48 hour period ------ 21

And, if the appless had not then been removed, it was its duty to close the car and not permit further unloading but RETAIN POSSESSION until the demurrage charges were paid ---------- 22

Garnishee defendant permitted "delivery" of the remainder of the apples in the car after service of the writ, by "passively" allowing Larson access to the car for the purpose of removing the apples ----------21-22

There was privity between the garnishee and the principal defendant as to this shipment, and the SOLE question is the "possession" or "custody" or "control" of the apples not removed at the time the writ was served -----24-25

There was an "accountability" to the principal defendant for safe keeping and custody of the property, and as carrier, and therefore petitioner was subject to garnishment in this instance ---------- 25

Plaintiff is not here seeking to charge the garnishee as a "debtor" of the principal defendant for any "indebtedness", but with the "possession" and "custody" of the property, and it makes no difference if that possession was rightful or wrongful, with or without

Page

"privity" (though in fact it was both rightful and with privity) ---------- 25

When writ was served, petitioner had active duties to perform and should have impounded the car of apples and was under obligation to plaintiff to retain custody and possession---- 26

C. "Ab Inconvenienti"—petitioner's claim of inconvenience, hardship and imposition of undue burdens upon it to allow this judgment to stand cannot avail and is not new, and has been decided adversely to such argument, furthermore, it would seem apparent that Congress recognizes such procedure after surrender of the bill of lading to the garnishee, (Uniform Bill of Lading Act, supra) ----------27-28

INDEX TO CITATIONS

Carmack Amendment, Sec. 1, Act June 29, 1906, 34 Statutes at Large, 584 ---------- 19

Davis v. Railway Co. 217 U. S. 157; 54 L. Ed. 708----- 28

Demurrage Tariffs-Interstate Commerce Commission Regulations ---------- 6

Durham v. Chicago & Northwestern Ry. Co. 224 Mich. 477; 194 N. W. 1014;-229 Mich. 468; 201 N. W. 503 ---------- 1, 2; 17; 28

Endicott-Johnson Corp. v. Encylclopedia Press, 45 Sup. Ct. Rep. 61-3; 266 U. S. 285 (4) ---------- 28

Erie Ry. Co. v. Shuart, 39 Sup. Ct. Rep. 519; 250 U. S. 465 ---------- 17; 23

Michigan Central Ry. Co. v. Mark Owen & Co. 41 Sup. Ct. Rep. 554; 256 U. S. 427 (and referred to throughout Brief) ---------- 10

Page

Michigan Garnishment Statute (Secs. 13,122, 13,123 Vol. 3, Comp. Laws 1915) ---------- 17

Nessen Lumber Co. v. Benett Lumber Co. 223 Mich. 349; 193 N. W. 789 ----------16, 17

Rood on Garnishment, Sec. 183 ---------- 26

Rood on Garnishment, Sec. 192 ---------- 26

Section 5—Uniform Bill of Lading ---------- 5

Southern Pacific Co. v. Di Cristina (Ga.), 127 S. E. 151 28

Southern Ry. Co. v. Prescott, 36 Sup. Ct. Rep. 469; 240 U. S. 632 ----------18; 23

State of Missouri, ex rel., St. Louis Ry. Co. v. Taylor, 45 Sup. Ct. Rep. 47; 266 U. S. 200 ---------- 28

Uniform Bill of Lading Act, August 29, 1916, Sec. 23; 39 Statutes at Large, 542 ----------19-20; 28

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1925.

No. 257

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

ALVIN R. DURHAM COMPANY, ET AL.,

Respondents.

BRIEF FOR RESPONDENT ALVIN R. DURHAM COMPANY

I.

STATEMENT OF CASE

Garnishment proceedings brought in the Circuit Court for the County of Gogebic, Michigan, October 8th, 1921. Verdict and judgment was entered in favor of the garnishee defendant, Petitioner herein, and against the plaintiff, Respondent, Alvin R. Durham Company, December 19th, 1921, and on October 1st, 1923, the Supreme Court of the State of Michigan reversed the decision of the Circuit court and granted a new trial. (Durham vs. Chicago & Northwestern Railway Company, 224 Mich. 477; 194 N. W., 1014). Thereupon, the garnishee defendant, Petitioner herein, filed a mo-

tion for re-hearing and brief in support thereof, which said motion the Michigan Supreme Court denied December 20th, 1923, whereupon Petitioner filed a petition for a writ of certiorari in this Court, together with a brief in support thereof and on April 28th, 1924, this Court denied the application for lack of jurisdiction, because no reviewable final judgment was rendered by the Michigan Supreme Court, a new trial having been granted. 44 Sup. Ct. 455. The cause was re-tried in the Circuit Court of Gogebic County, Michigan, on May 23rd, 1924, on the same record and state of facts as before, and the trial court directed a verdict for respondent, Alvin R. Durham Company, whereupon, petitioner herein removed the case to the Michigan Supreme Court, and all and the identical issues and legal propositions here urged, were orally argued at length and written briefs thereon submitted for a third time, to said Court, which, on December 31, 1924, again entered judgment in favor of respondent herein. (229 Mich. 468, 201 N. W. 503).

The issue in the case being between the plaintiff-respondent, Alvin R. Durham Company, and the railway company, garnishee defendant-petitioner, and involves petitioner's liability as garnishee-defendant of Larson, for the value of about three-quarters of a carload of apples, an interstate shipment, to the amount of Six Hundred Dollars.

Upon the second trial the trial court directed a verdict in favor of plaintiff and against the petitioner herein for $678.75 damages and the costs to be taxed (Trans. 14, fol. 28*). Petitioner now asks this Court to reverse the judgment of the Michigan Supreme Court which affirms said judgment of the Circuit Court.

---

*These references to "Trans." are to the pages of the Transcript of Record printed by the Clerk of this Court, and now on file herein, being cause No. 257, October Term, 1925).

II.

STATEMENT OF FACTS

The plaintiff-respondent is a judgment creditor of the defendant Larson, having obtained judgment against him in said trial court, on the 30th day of November, 1921, for the sum of $1,099.00 damages and costs taxed at $25.10 (Trans. 3, fol. 5).

On the 4th day of October, 1921, there was billed by L. G. Jebavy, shipper, received and receipted for by the Pere Marquette Railroad Company, at Ludington, Michigan, a car load of apples in bulk, consigned to the order of the shipper at Ironwood, Michigan, "Notify F. M. Larson" shipped on an "Order Bill of Lading" and routed and shipped, "P. M. Ferry to Manitowoc, and Northwestern," "Destination, Ironwood" (Trans. 12, fol. 23). This car arrived over the Chicago and Northwestern Railway at its yards in Ironwood, Michigan, during the afternoon of October 7th, (Trans. 12), and notice of its arrival was given to F. M. Larson. The next morning about 8 o'clock, October 8th, the principal defendant Larson, presented at the freight office of the company at Ironwood, the original, "Order Bill of Lading" duly stamped by the Merchants and Miners State Bank, Ironwood, Michigan, "Paid Oct. 7, 1921" (Trans. 8, fol. 15), surrendered it to the Railroad Company, paid the freight charges on the carload of apples and signed the usual receipt therefor (Trans. 12). The car was then on the "team track," one of the "public delivery tracks" of said Railway Company at this station used for unloading freight received in car load shipments, but not connected in any manner with the railway freight warehouse (Trans. 2, fol. 4; 7, fol. 13). Larson commenced unloading the car at about 8:20 in the morning of that day (Trans. 5). On the same day (the 8th of October), the plaintiff sued out of said

Circuit Court the writ of garnishment against the Railway Company, and the writ was duly served at the hour of 9:45 o'clock in the forenoon, upon said garnishee defendant (Trans. 12, fol. 23; 13, fol. 26).

At the time of such service of the writ the defendant Larson had unloaded about "one quarter of the apples" from the car (Trans. 12, fol. 23) and thereafter, and notwithstanding the garnishment, defendant Larson was permitted by the garnishee defendant to continue the unloading and completed the same on the 12th day of October, **four days after the service of the writ** (Trans. 13, fol. 25). Moreover, the testimony shows that "in **the meantime**" the car was switched or shunted by the railroad company in order to place another car ahead of it. And it is undisputed that while the car was being unloaded it was so switched several hundred feet. (Trans. 4, fol. 8; 5, fol. 9; also Ex. 1, Trans. 7, fol. 13). It was switched or shifted one or more times after the unloading was begun and on each occasion as will appear from the map, said Exhibit "1", it must have been moved beyond the switch some 500 feet from where it had been previously placed for unloading, and the unloading had to be discontinued or abandoned during such switching operations (Trans. 14, fol. 26). Larson testifies, "I know it was shifted around during the time it was there" (on the "public delivery track") (Trans. 4, fol. 8). The station agent Shove, testified: "It must have been moved after they started to unload the apples", (Trans. 5, fol. 9). And again, "Sometime between 8 and 9 in the morning it was moved a little easterly", (Trans. 13, fol. 25); this was after it was "first placed at the final end" of the track (Trans. 13, fol. 25), and they started to unload, "about 8:20 in the morning" (Trans. 25, fol. 26), and when the car was switched the truck could not follow and the unloading would have to stop (Trans. 14, fol. 26). Beside, this was a carload of

"bulk apples", (Trans. 8, fol. 15; 12, fol. 23), and when the "summons was served", it is stipulated that, "three-fourths of the car load of apples" were " in dispute", (Trans. 2, fol. 5), that is to say, were still in the car unloaded. (Trans. 12, fol. 23). The car—a box car—was locked nights by the principal defendant, but this was after the service of the writ of garnishment, and no watchman was provided by him. (Trans. 4, fol. 8).

The Bill of Lading, Exhibit 2, (Trans. 7-8), is the uniform "Order Bill of Lading" prescribed for interstate shipments of freight and Sections 5 and 10 of its "Conditions" are set forth in full (Trans. 8-9, fol. 16). Section 5 is as follows:

> Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.
>
> The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.
> * * *

Certain of the rules and regulations relating to charges of demurrage, the collection and payment thereof, the lien of the carrier upon such property for such charges and the

right of the carrier to retain the same until such charges are paid, are set forth in full in the record (Trans. 3, fol. 6-7) and are as follows:

> Item 3, Rule 1, Sec. A: "Cars of either railroad or private ownership, held for or by consignors or consignees for loading, unloading, forwarding directions or for any other purpose (including cars held for loading company material unless the loading is done by the railroad for which the material is intended and on its tracks) are subject to these demurrage rules, except as provided in Section B."
>
> Item 4, Rule 2, Sec. A, subdivision a and b: Section A: "Forty-eight hours (two days) free time will be allowed for loading or unloading all commodities. (See rule 2, Section B, Paragraph 4.)"
>
> "Unloading" includes:
>
> "(a) Surrender of bill of lading on shipments billed 'to order.' "
>
> "(b) Payment of lawful freight charges when required prior to delivery of the car."
>
> Item 5, Rule 3, Sec. B: "On cars held for orders, surrender of bill of lading or payment of freight surrender of bill of lading or payment of freight charges, whether such cars have been placed in position to unload or not, time will be computed from the first 7:00 a. m. after the day on which notice of arrival is sent or given to the consignee or party entitled to receive the same."
>
> Item 9, Rule 7, Sec. A: "On cars not subject to Rule 9 (Average Agreement): After the expiration of free time allowed the following charges per car per day, or fraction of a day, will be made until car is released:
>
> For each of the first four days, $2.00.
> For each succeeding day, $5.00."

The map or plat before referred to introduced and marked Exhibit 1, (Trans. 7, fol. 13) is attached to the return of the writ of error to the Michigan Supreme Court, and shows the location of the "public delivery track" northerly of the

freight ware-house, upon which the car was placed for unloading and upon which it was located at the time of the service of the writ, and also the relation of such track to the freight warehouse and the distance from the terminus of such track to the first switch easterly of such warehouse. It was stipulated that Manitowoc, through which the shipment was routed and passed, is in the State of Wisconsin, and, as is well known, is the terminal port of one of the Pere Marquette Car Ferry routes from Ludington, Michigan.

III.

ARGUMENT

A.

Counsel for the garnishee defendant-petitioner herein include in their Petition and Brief, purported statements of fact which we cannot let pass unchallenged, and in fairness, we point out certain inaccuracies. We challenge the statement that after Larson's entry of the car he exercised "complete dominion" thereover (Brief p. 2). Again Counsel assert, "The party named in the bill of lading as the one to be notified—**took possession of the car**", (Petition page 15) and refer to "Trans. 22-23". But the reference does not warrant the assertion. Included by Mr. Bell the attorney for garnishee in his claim of the facts before the trial court, namely: "Possession of the car was immediately given him", it was immediately challenged and disagreed to by plaintiff's attorney, who said: "We accept Mr. Bell's statement as correct except where he reaches the conclusions—that the car or the apples were delivered to Larson or were in the possession of Larson at the time of the making the affidavit or the service of the writ." Trans. 12, fol. 24).

Beyond a peradventure it was impossible for the defendant and his drayman, ("they") to have "entered the car", and likewise impossible for the defendant Larson to have been "personally in the car" either "from the time they opened it" or "until the summons was served", as solemnly asserted by Counsel. When "they opened it" **the car was full of "bulk apples"**, when the "summons was served" it **was three-fourths full of "bulk apples".**

Where then was the room for defendant and his man in the car? Will Counsel say **"Between the apples and the roof of the car"?** And when the car was switched or "shifted" and the car closed, where was defendant then? Was he still maintaining "possession" at risk of life and limb? Who then was "in control and possession" of the car and its contents if not the Garnishee? And so it was and remained at the time "the summons was served".

This Court also will search the entire record in vain for as much as a scintilla of evidence which sustains Counsel's assertion (Petition page 15) that Larson was personally "in the car" superintending the unloading. The fact is that the car was at first full of **loose** (bulk) apples and three-fourths full at the time of the service of the writ and it was a physical impossibility for either, Larson, or any of his assistants to be "in the car" at the time or previous to the service of the writ unless they squeezed themselves in between the contents of this box car, (24,000 pounds of bulk apples) and the ceiling of such car.

And so far from the record showing, as asserted by counsel, that either the car or the apples were "in the physical possession" of Larson, the fact, as we submit, is, that both the car and the apples were in the "possession" both "physical" and actual, and "under the control" of the garnishee railway company, at the time of the service of the writ, and

that, in the language of this Court, in the Mark Owen case, **infra**, "access was only given to it" (the property) "that it might be removed," by the consignee.

The garnishee-petitioner, treats as unimportant the moving of the car during the process of unloading, by said railway company in its switching operations, and finally assumes, mistakenly as we show later, that there had been an actual "delivery" of the apples to Larson before the service of the writ, and to support this assumption contends, that "delivery" of the shipment here, has a different content and meaning from "delivery" of the shipment, as used in the Mark Owen case, **infra**, under almost precisely the same circumstances, in which this court says of the freight (grapes) there, **"the property here was not delivered,** access was only given to it that it might be removed, **it was within the custody of the railroad company".**

B.

The bill of lading, and the rules and regulations subject to which it is issued and accepted, constitute the contract between the parties, the carrier, the shipper and the consignee, and necessarily limit and govern their rights in the shipment and the rights of those claiming under them, and it is well settled, that the liability of the garnishee in respect to the property in his hands is governed and must be determined by such contract and can neither be enlarged, restricted, modified nor impaired as to the garnisheeing creditor and his rights.

It is, therefore, the contention of the plaintiff respondent here, that the rights of the parties in this case, fixed as they are by the contract of shipment, are settled, and this case

governed by the recent decision of this Court, in the case of **Michigan Central Railway Company v. Mark Owen Co.**, already referred to, 41 **Sup. Ct. Rep.**, 554; 256 **U. S.**, 427.

In that case this Court construed Section 5 of the "Conditions of the uniform bill of lading, which **in haec verba** is Section 5 of the "conditions" of the Bill of Lading in this case (Pl. Ex. 2, Trans. 7-9), and there held that such bill of lading is a contract between the transportation company and those interested in the shipment, and that under said section 5, pending the 48-hour period, the shipment was "in the custody of the railroad company, the company having the same relation to it that the company acquired by its receipt and transportation" (Ibd. 556).

And it held, quoting from the syllabus, that, "Under the provisions of the uniform bill of lading that property not removed within 48 hours after notice of its arrival may be kept in car, depot, or place of delivery, subject to the carrier's responsibility as warehouseman, etc., the carrier's liability, as carrier, continues during the 48 hours **unless the property is removed within the time,** though the car is accepted by the consignee, the seals broken and the unloading commenced." And further, "Where a car on arrival at destination is placed on a public delivery track, and notice given the consignee, who accepted the car, broke the seals and started to unload, **there was no delivery of the property still in the car, but only the right of access given to it, in order that it might be removed"** (Ibd. 554).

The main—if not the only—contention of counsel, is that the Owen case and the decision of this Court therein, is not controlling, and the reason given by counsel therefor, is "In the Owen case the question was one of contract liability under the terms of a bill of lading, while here it is one of custody or possession in a Michigan garnishment proceeding".

The like reason was repeated and urged by counsel three times before the Michigan Supreme Court and we submit, when analyzed, IS NO REASON AT ALL. Amplified, and so corrected, counsel's "reason" would be stated thus: "In the Owen case the question was one of contract liability under the terms of a bill of lading of an interstate shipment" —a liability depending entirely upon the relation, under the terms of such bill of lading, of the railway company to the shipment and in THAT case whether **"delivery"** of the shipment of grapes had then been made to the consignee by the company or it still had **"custody"** of such shipment—"while here it is one of custody or possession in a Michigan garnishment proceeding"—**under the identical terms of a bill of an interstate shipment,** the "liability" depending entirely upon the relation, under the terms of such bill of lading, of the railway company to the shipment, and in THIS case whether "delivery" of the shipment of apples had then been made to the consignee by the company, or it still had "custody" of such shipment!

What then becomes of counsel's contention and reason?

The vital facts in each case were the same. In the Owen case the order-consignee, paid the freight, surrendered the order bill of lading, accepted the car—then on the public delivery track—**broke the seals** and started to unload, and the loss occurred within the 48 hour period, of part of the shipment not then removed. In this case the order consignee, Larson, paid the freight, surrendered the order bill of lading, accepted the car—then on the public delivery track—(may or may not have **broken the seals,**—the fact does not appear), and started to unload, and the garnishment occurred within the 48 hour period, of part of the shipment not then removed.

In the Owen case, this Court held:

> (a) That the relation of carrier continued during the 48 hour period "unless the property is removed within that time",
>
> (b) That there was **"no delivery of the property still in the car"**,
>
> (c) That as to such "property still in the car" there had been, "only a right of access given to it, in order that it might be removed",
>
> (d) And that by necessary consequence, the "property, still in the car" then was "within the custody of the railway company" and it was liable accordingly.

It necessarily follows, in THIS case,

(a) That the **relation of carrier continued** during the 48 hour period "unless the property is removed within that time",

(b) That there was, **"no delivery of the property still in the car"**,

(c) That as to such "property still in the car" there had been **"only a right of access given to it, in order that it might be removed"**,

(d) And that by necessary consequence the "property still in the car" **then was "within the custody of the railway company"** and it is liable accordingly.

In each case the vital and decisive facts and questions were the same, and as the Michigan Supreme Court in the decision of this case recognized, the decision in the Owen case is the law of this case, and decisive accordingly in this respondent's favor.

So the logic of the opinion of the court in the instant case, is irresistible, namely,

(a) "If the position of the railway be that of carrier during the 48 hour period **it must follow** that it is, during that period liable as carrier." (And this Court so held in the Owen case).

(b) "If the railway company be liable as carrier, **it must also follow** that the apples remaining in the car before the expiration of that period are **within the custody, control and possession of the carrier".**

(c) And it follows, "that under the foregoing construction of Section 5" the holding of the Michigan Supreme Court "that defendant Railway **had property in its custody and under its control belonging to the principal defendant when the summons was served",** is correct, and the only possible holding,—without the disregarding and nullifying of the Owen case and its holding.

The railway company had plenary control and power over the car and over the apples remaining in the car at the time the summons was served—any less control and power is wholly inconsistent with the contract relation to such property during the 48 hour period and the consequent rights, duties and liability of the company as carrier as defined in the Owen case in regard to the property still remaining in the car. As to such property "there was **no delivery",** "but only a **right of access** given to it **in order that it might be removed".**

This "right of access" thus "given" was a mere license revocable at any time by the Railway Company, certainly **for cause, such as service of process in garnishment.**

In the meantime the apples remained and were in the **"custody and control"** of the Railway Company, and as carrier.

The relative rights and liabilities of the Railway com-

pany, as carrier,—and of the consignee—under the bill of lading—in the shipment still in the car during the 48 hour period, do not depend upon the fact of the payment of the freight bill—but upon thte fact of **"delivery"** or **"no delivery"** of the shipment still in the car, and the consequent **"custody and control"** by the carrier of the shipment "not removed", but still in the car. And in this case the apples not removed had not been delivered, and were in the custody and control of the garnishee and as carrier when garnished within the 48 hour period.

As in the case at bar, the shipment there was interstate, upon an order bill of lading, the consignee (order-indorsee) had surrendered the bill of lading, paid the freight charges, receipted for the shipment, **broken the car seals** and commenced unloading, and had the shipment partly unloaded. "The loss, whatever it was," for which the Mark Owen Co., sought to hold the railroad company liable, "occurred after the acceptance of the cars and their unloading had commenced" (Ibd. 555), and as stated by the court, "whether the railroad company is liable therefore, and in what capacity liable—whether as carrier or warehouseman or at all — is the question in the case" (Ibd. 555). And answering this question, the Court, as we have seen, **hold that no delivery of the shipment to the consignee had been made,** that the relation of carrier continued and, therefore, the railroad company was liable for the loss of the freight (grapes) in the car occurring within the 48-hour period, though negligence of the railroad company had not been shown (Ibd. 556). And in so holding, this Court said, **"The property here was not delivered, access was only given to it that it might be removed,** and the 48 hours was given for that purpose. **Pending that time it was within the custody of the railroad company,** the company having the same relation to it that the company acquired by its receipt and had during

its transportation" (Ibd. 556). As this finding of the Court, *that the property had not been delivered, and access only* given to it that it might be removed, and that pending such removal within the 48 hours, "it was within the custody of the railroad company," is the decisive point and the very gist of that case, so it is in this case, and is therefore exactly in point and decisive in this as to non-delivery to Larson, and the custody of the shipment by the railroad company pending the 48-hour period and at the time of the garnishment, and we submit is therefore decisive of the case at bar.

To hold otherwise in this case would, we submit, be utterly inconsistent with and contrary to the decision in the **Mark Owen case,** and that decision is authoritative and conclusive.

It is absurd to say, as does the garnishee defendant in this case, that the railroad company had delivered the goods and parted with all possession and control, and all right in that regard, when at the same time the railroad company is held to all the care, risk and liabilities of a carrier, or insurer, in case of theft or other loss of or damage to the goods in the meantime because they still remain "within the custody of the railroad company" as is held in the **Mark Owen Case, supra.** The two propositions are utterly inconsistent and cannot stand together, and it makes no difference that this continuing risk and liability as carrier is held to be in a sense contractual, or rather left by the provisions of Section 5 of the bill of lading to the common law liability. Certainly the possession and control of the goods by the carrier must be and in the case at bar was as complete and full as its liabilities and risk is great. They must be and we submit **are co-extensive and plenary.**

The carload of apples arrived in Ironwood on October 7th. Larson commenced unloading on October 8th and the un-

loading continued until October 12th. The car was switched about in the meantime. Larson, the principal defendant, did not have a watchman there at night (Trans. 4, fol. 8), but left the car and apples on the garnishee defendant's public delivery track unattended.

Suppose the writ of garnishment had been served a few moments before the car was opened by Larson?

What if the writ had been served during the switching operation?

And, what would petitioner here contend if the writ had been served during the nighttime of October 8th, when the car and apples still remaining were on this public delivery track where Larson left them unattended and without a watchman of his own?

The conclusion is irresistible that the Owen case, supra, is directly in point. Until completely removed from the car, the apples were and remained in the custody and control of the garnishee defendant, petitioner, on its public delivery track.

We respectfully quote from the very able opinion of the Michigan Supreme Court in this same case, 224 Mich., 480-481; 194 N. W. 1014, 1015:

> "Counsel for the garnishee defendant has filed a persuasive brief in which he urges the point that the railway had done everything it could to make delivery of the apples to the principal defendant before the summons was served upon it . . . . but the Federal Court construction of Section 5, and our own case of **Nessen Lumber Co. vs. Bennett Lumber Co.**, 223 Mich., 349, (193 N. W. 789), forbid our making those facts conclusive of the question of custody and control. It is pointed out in the Federal case cited that the contract between the parties continues the railway company as a carrier for 48 hours, after notice is given to the consignee of its arrival, as to the property not already removed within that time.

> If the position of the railway be that of carrier during the 48-hour period it must follow that it is, during that time, liable as a carrier. If the railway company be liable as carrier it must also follow that the apples remaining in the car before the expiration of that period are within the custody, control and possession of the carrier. We are impressed that under the foregoing construction of Section 5 we must hold that defendant railway had property in its custody and under its control belonging to the principal defendant when the summons was served."

Affirmed on second appeal:

> Durham vs. Chicago & Northwestern Railway Company, 229 Mich. 468; 201 N. W. 503.

Petitioner cites the Michigan statute of garnishment but has omitted from its brief the recent interpretation and exposition of said statute in the case of:

> Nessen Lumber Co. vs. Bennett Lumber Co. 223 Mich. 349; 193 N. W., 789,

approved and cited in the present case, **supra,** in favor of respondent.

The rights of respondent and the extent of its remedy under said garnishment statute (Sections 13,122, 13,123, Vol. 3, Comp. Laws, 1915) have been settled, and are now at rest.

In **Erie Railroad Company v. Shuart, 39 U. S. Sup. Court Rep.,** 519; 250 **U. S.,** 465, the question whether the interstate carriage or transportation of freight had terminated so that the bill of lading and its stipulations had ceased to govern the rights of the parties was decided in the negative and the liability of the company was determined by and under federal law as applied to the bill of lading.

The shipment was horses. The car containing the horses had arrived at the destination, had been placed on a switch track opposite a cattle chute and left in charge of the con-

signee for unloading. The chute and car had been connected by the bridge and the consignees were about to lead out four of the horses when the railway employes bunted the car and the injury resulted (Ibd., 466, 467). The bill of lading provided, that in case of claim of injury notice must be given by the shipper or his consignee to the company within five days, and the Court holds the parties are still under and bound by the provisions of the bill of lading and must therefore give such notice. In so holding the Court said: "We think that giving active charge of removal as agreed was not enough to end the interstate movement. The animals were in the car, no adequate time for removal had transpired. The carrier had not fully performed the services incident to final delivery imposed by law. These included the furnishing of a fair opportunity and proper facilities for safe unloading, although the shippers had contracted to do the actual work of removal" (Ibd., 468). Further facts bearing upon the claimed delivery appear in the dissenting opinion of Mr. Justice Clark, namely, "The journey was ended, the freight charges paid, the car placed on the side-track in proper place and position for unloading, approved by consignees and accepted by two of the co-partnership" (consignees) (Ibd., 470).

In Southern Railway Company v. Prescott, 36 U. S. Sup. Court Rep., 469; 240 U. S. 632, the question to be determined was whether the carrier's contract under its bill of lading of an interstate shipment of freight, governed by federal law, had been discharged and a new obligation created as warehouseman governed by local law. This is held to be a Federal question and decided in the negative, that is to say, the liability under the bill of lading had not been discharged.

In that case the freight, consisting of thirteen boxes of shoes had arrived at destination, the consignee had been

notified, and he **had paid the freight and receipted for the goods** and removed four of the boxes, when the remaining nine boxes were destroyed by fire which destroyed the company's warehouse with the contents, after the expiration of the forty-eight hour notice.

As in the case at bar (Trans. 8, B-L Sec. 5, Ex. 2), one of the stipulations of the bill of lading was that "property not removed by the party entitled to receive it within 48 hours (exclusive of holidays) after notice of its arrival might be kept in car, depot or warehouse, subject to reasonable charges for storage and to carrier's responsibility as warehouseman only" (Ibd., 470).

And the Court say, in part: "It is apparent there had been **no actual delivery of the nine boxes. The payment of the freight had no greater efficacy than if it had been made in advance of transportation. The giving a receipt for the goods by the consignee did not alter the fact that they were still held by the railroad company awaiting actual delivery.** The actual **service in holding the goods continued,** and we must look to the bill of lading to determine the legal obligations attaching to that service" (Ibd., 472).

And so it is held that the provisions of the bill of lading govern making the carrier liable as warehouseman only, and therefore only, in case of negligence.

The term "transportation" as defined in the **Carmack Amendment, Section 1, Act June 29, 1906, 34 Statutes at Large** 584, "shall include cars and other vehicles and all instrumentalities of shipment or carriage and **all services in connection with** receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported."

Congress in the **Uniform Bill of Lading Act, August 29,**

1916, Sec. 23; 39 Statutes at Large, 542, recognizes that the surrender of the order bill of lading, is not of itself **a delivery of the goods or of possession** so as to preclude garnishment of the carrier for the goods, for it expressly provides that goods in the possession of the carrier, in case of an order bill of lading **cannot be attached by garnishment** of the carrier, **"unless the bill be first surrendered** to the carrier" and further that "the carrier shall in no such case be compelled **to deliver the actual possession of the goods** until the bill is surrendered or impounded by the Court."

We insist, therefore, that in the case at bar **no actual delivery** of the car load of apples had been made, either of the car with the apples or of the apples in the car. If perchance there was a **constructive** delivery, that does not matter. The fact is the railroad company, garnishee herein, remained and was in possession and control of the car itself, and necessarily of its contents. The car stood upon the railroad company's tracks, it belonged to and was the property of the railroad company, it was subject to be moved and was in fact moved by the railroad company in its switching operations. The property not removed was still in the car and subject to all the liabilities and rights of the railway company under its contract of carriage, and the principal defendant had "access to it only that it might be removed." If, as he says, he locked the car nights, this was not done **until the night after the writ of garnishment was served,** and is, therefore, of no significance and cannot affect the rights of the plaintiff, and may properly be said to be as much for the protection of the railroad company as of the defendant Larson. And under the bill of lading—the contract of the parties—in the happening of the supposed contingency named in Section 5 of the bill of lading, the apples that remained—not removed—within the 48-hour period, could by the company be **"kept in car,** depot or place of de-

livery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or **at the option of the carrier removed to and stored in** a public or licensed warehouse at the cost of the owner," and so within the 48-hour period were necessarily held subject to this right of the company in the event of the happening of this contingency—a right we submit inconsistent with previous **actual delivery to and full possession by Larson.**

Moreover, under the "tariffs, rules and regulations of the Interstate Commerce Commission" (Trans. 3-4), the car and its contents were subject to demurrage charges, after the expiration of the "48 hours' free time for unloading" and so also if stored in carrier's warehouse after this 48-hours' period, and in either case the railroad company had and must have the right to possession and control of the car and its contents until such charges had been paid.

The apples which had been taken and removed by the principal defendant "about one-quarter of the bulk of the apples" (Trans. 12), undisputedly were **delivered** by the garnishee before the service of the writ, but the apples then in the car of the railroad company, on its tracks, moved by it, remained and were **"in its custody,"** or, in the language of our garnishment statute **"under its custody and control"** and **"access was only given to it that it might be removed"** by the principal defendant, Larson, and the fact, that the garnishee after the service of the writ did nothing but to remain passive, that is to say, **knowingly allowed the principal defendant continued access to the car and the apples in the car, that he might remove them from "its custody," whereby they were removed,** clearly is in law and in fact a "delivery" of the apples contrary to the command of the writ. "Delivery" may be made **actively,** as by handing over

the property and full possession and control, and putting the party in exclusive possession, or **passively**—but none the less effectively—as by knowingly allowing another (in this case the principal defendant) continued access to the property for the purpose of its removal, whereby it passes into the custody and possession of that other (here the principal defendant).

Counsel's suppositions that if at the moment the writ was served, Larson had brought suit either for the value or the recovery of the property he could not maintain it, because he was then " in the actual possession of the apples" begs the question by assuming he was then in actual possession of the apples. Was he then in actual possession of the **carload of apples**, or only of the one-fourth part which he had reduced to his actual sole possession by removal? And this supposition of counsel is in direct conflict with the holding of this Court in the **Mark Owen case**, that, "the property here **was not delivered, access was only given to it that it might be removed, it was within the custody of the railroad company."**

The bill of lading is the contract between the parties, and under that contract the railroad company not only had the right, but it was its duty in case the apples had not been all removed within the 48-hour period, namely, not later than 6 o'clock in the afternoon of October 10th, to close the car and not permit further unloading until the demurrage charges had been paid, by Larson, or in lieu thereof to remove and store the apples either in its own or some public warehouse, at Larson's expense. How then could the company have and retain possession and custody of the apples after the 48-hour period, if, as contended by counsel, it had **parted with and surrendered actual possession and custody** —made actual delivery—previous to the garnishment?

The rights of the company would seem to negative and be

absolutely inconsistent with the claim of the garnishee defendant.

As in the **Shuart case, supra,** the "interstate movement of this freight had not ended, no adequate time for removal had transpired," the "carrier" (in this case the garnishee) "had not fully performed the services incident to final delivery imposed by law."

As in the **Prescott case, supra,** the payment of the freight and receipt for the goods, "did not alter the fact that they were still held by the railroad company awaiting actual delivery. The actual service in holding the goods continued."

As in the **Mark Owen case, supra,** the goods were "held by the carrier during the 48-hour period, as carrier, with all its attendant risks and responsibilities." And, if the company had held them as warehouseman, it would still be subject to the garnishment and be liable accordingly. An attempt by counsel to distinguish the **Mark Owen case,** in the meaning of the world "delivery" as used in that case is not convincing, but confusing. It is "shedding darkness rather than light" upon the subject.

It was the contention of the counsel for the railroad company in that case, as stated in the opinion of Mr. Justice McKenna, **"that where delivery has been made of the property as, it insists, was true in the case at bar,** the responsibility of the railroad company as carrier immediately ceases. If, however, it is neither delivered nor removed within 48 hours after notice of its arrival, the responsibility of the railroad company thereafter is that of 'warehouseman only' " (Ibd. 556). To this contention the Supreme Court of the State (Illinois) "answered that the bill of lading provides for property 'not removed'—not to property 'delivered' or 'not delivered,' and it must be taken at its word" (Ibd. 556).

As to this distinction of the state court this Court says, "The answer puts **too much emphasis upon the distinction between property removed and property delivered,"** and then meeting the issue squarely and answering the railroad's contention and attempted distinction directly this Court declares, **"The property here was not delivered"; clearly** using the word "delivered" in the same sense the railroad company had used the word "delivery" in insisting that **"delivery had been made"**—and then continuing, **"access was only given to it that it might be removed,** and 48 hours was given for that purpose. Pending that time it was within the custody of the railroad company," etc. Ibd. 556).

How can it be said as does counsel that the **apples** in this case **had been "delivered"** to Larson, and that pending **their** removal, within the 48-hour period, the apples not removed **were not "in the custody** of the railroad company," and at the same time say, as does this Court in the **Mark Owen case** under precisely like facts, that the **grapes had not been "delivered"** to the consignee, and were "in the custody of the railroad company," as carrier, "pending the 48 hours given for removal"—and after that, of course, as warehouseman?

Would counsel venture to distinguish because in the one case the freight was **apples** and in the other **grapes?**

To insist and urge as does counsel, "the garnishee must not only have actual possession of the defendant's property, but there must be privity between him and defendant both of contract and of interest, by which the defendant would have a right of action or an equitable claim against the garnishee to recover the property for his own use either at the present or some future time" if correct (and to this proposition there is at least the exception, created by statute,

that a creditor may reach property by garnishment in the possession of the garnishee under a transfer made in fraud of creditors that the defendant himself could not reach or recover) does not militate against plaintiff's claim, for the reason that there is privity between the garnishee and the principal defendant as to this shipment of apples, and the sole question is the "possession" or "custody" or "control" of the apples not removed at the time the writ was served.

So likewise as to counsel's proposition, "The liability of a garnishee in respect of property of the defendant in his hands is to be determined ordinarily by his **accountability to the defendant,** on account of the property"; and for that very reason the decision in the **Mark Owen Co. case, supra,** is directly in point for plaintiff, respondent, for under like facts and circumstances to those in the case at bar, that case expressly holds the Railway Company **accountable to defendant** for the safe keeping and custody of the property and as carrier; and further, that there had been no "pre-existing contract" by which "that accountability" has been removed or modified.

Nor has counsel's further proposition any application to the case at bar, namely—"In order to charge the garnishee as debtor of the defendant, the defendant shall have a cause of action against the garnishee"—for the plaintiff, respondent, is not seeking here to charge the garnishee, petitioner, as debtor or for any indebtedness whatsoever, but, as above stated, with the "possession" and "custody" of the property of the defendant. That the apples were the property of defendant is established, the sole question then is "possession" or "custody" or "control" of the property by the garnishee, petitioner herein, and for the purpose of this case it would make no difference whether that possession was rightful or wrongful, with or without "privity" (though in fact, it was both rightful and with privity).

The railroad company, garnishee defendant, petitioner in the instant case had made no delivery of the apples, that had not been made by the railroad company of the grapes in the **Mark Owen case**, and pending the removal of the apples within the 48-hour period the apples were "in the custody of the railroad company" **to the same extent and in the same way as were the grapes** "in the custody of the railroad company" in the **Mark Owen case**; and, if the apples were "in the custody of the railroad company" in this case, then the company was necessarily subject to garnishment therefor, and upon being garnished it became and was the duty of the railroad company to retain them **"in its custody"** until discharged by law. This it did not do.

> "As soon as the process is served on the garnishee, he has **active** duties to perform. He must impound the property in his possession or the debt owed by him to satisfy any judgment the plaintiff may recover, and he cannot escape liability to the plaintiff therefor, by allowing it to be subsequently removed from his control. If, after he is served with process, any one attempts to take the property or recover the debt from him by legal process, it is his duty to exhaust all authorized meanss to prevent it."
>
> Rood on Garnishment, Sec. 183.
>
> "The garnishee cannot escape liability to the plaintiff **therefor by afterwards** delivering or paying it to the defendant or anyone else, **or allowing it to escape his control,** even though taken by an adverse claimant by virtue of legal process, unless he has exhausted all legal means to prevent it, and without avail."
>
> Rood on Garnishment, Sec. 192.

No one can be held liable as a trespasser while performing a duty imposed on him by law in obedience of a lawful command.

C.

Counsel's argument of inconvenience—**"ab inconvenienti"**, cannot avail and is not new.

The same argument was urged at as great length and with as much force, upon this Court, but without avail in the Mark Owen case. Counsel for the Railroad Company in that case, on page 34 of their brief, under "Conclusion", say:

> "The amount involved in this case is insignificant, but the principle on which the judgment of the state courts is based is of vital importance, and on its final determination will depend the liability in a great number of similar claims. Also, if the decision of the Supreme Court of Illlinois is to stand, the practice now followed by petitioner on its various team tracks will have to be entirely changed and the same will also be true of other carriers under like circumstances. Not only will a common carrier be called upon to perform the duty it contracts to perform, but it will also be called upon to perform an additional duty, if the inability of a consignee to unload makes the performance of such a duty necessary. It will also not only be called upon to insure the honesty of its own employees over which it has, theoretically at least, some jurisdiction, but will also be called upon to insure the honesty of employees of consignees over which employees it has no jurisdiction whatsoever. We do not believe the law and the language of that provision of the bills of lading now in question, can be so twisted as to bring about this result. The burden of a common carrier is indeed great, but there is certainly a limit to it somewhere and we submit that that limit has been reached, when, as in this case, a consignee, by its own action, entirely relieves a carrier from any obligation to perform any duty whatsoever with reference to a shipment. We cannot understand the justice of the position of the respondent here in first assuming sole control over this property and thereafter requiring petitioner to make good losses which may have occurred as a result of the inefficiency or dishonesty of its own employees."

As previously pointed out, "Congress in the **Uniform Bill of Lading Act, August 29, 1916, Sec. 23, 39 Statutes at Large,** 542, **recognizes that the surrender** of an order bill of lading, is not of itself a **delivery of the goods or of possession** so as to preclude garnishment of the carrier for the goods, for it expressly provides that goods in the possession of the carrier in case of an order bill of lading **cannot be attached by garnishment of the carrier 'unless the bill be first surrendered to the carrier'** and further that 'the carrier shall in no such case be compelled to **deliver the actual possession of the goods** until the bill is surrendered or impounded by the court' ", and the argument or consideration of the inconvenience did not avail with Congress, much less can it avail with the court.

See:

Davis vs. Railway Co., 217 U. S. 157; 54 L. Ed. 708.
Endicott-Johnson Corp. v. Encyclopedia Press, 45 Sup. Ct. Rep. 61-63; 266 U. S. 285 (4).

Southern Pac. Co. vs. Di Cristina, (Ga) 127 S. E. 151.

"No peculiarity of state procedure will be permitted to enlarge or to abridge a **substantive** federal right."

State of Missouri ex rel., St. Louis Ry. Co. vs. Taylor, 45 Sup. St. Rep. 47; 266 U. S. 200.

Further, and finally, the identical issues presented here for review, have been three times before submitted to the Michigan Supreme Court on the same record of facts and authority, and after careful consideration, have been three times adjudicated by said court adversely to the garnishee defendant-petitioner and its present contentions.

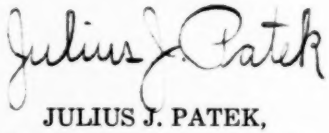
224 Mich. 477, 194 N. W., 1014;
229 Mich. 468; 201 N. W. 503.

A petition for re-hearing of the first decision reported as above, was applied for, and supported in a brief filed by

counsel for petitioner herein, and later denied by the court.

We respectfully pray therefore, that this Honorable Court deny any relief to petitioner, and in all things Affirm the judgment and determination of the Michigan Supreme Court.

Respectfully submitted,



JULIUS J. PATEK,
Counsel for Respondent, Alvin R. Durham Company.

JOSEPH L. HOOPER,
MYRON H. WALKER,
SOLOMON W. PATEK,
Of Counsel.